

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

NOEL VALDIVIA, SR.,

Petitioner,

No. 2:05-CV-00416 ALA HC

vs.

JILL BROWN, et al.,

Respondents.

ORDER

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Pending before the court are Noel Valdivia, Sr.’s (“Petitioner”) application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254(a) (doc. 1), Respondents’ Answer (doc. 16), and Petitioner’s Traverse (doc. 21). Also before the court are the parties’ briefs filed in response to our December 18, 2007, order requesting additional briefing on the applicability of *Iron v. Carey*, 505 F.3d 846 (9th Cir. 2007). For the reasons stated below, Petitioner’s application is granted.

I

On July 10, 1980, Petitioner was involved in a robbery during which Charles Decker was shot and killed. In 1981, Petitioner pleaded guilty to first degree murder for his involvement in that crime. The Superior Court of San Joaquin County (“Superior Court”) sentenced him to twenty-five years to life, with the possibility of parole. Petitioner’s earliest parole date was

October 11, 1995.

On June 1, 2004, the California Board of Prison Terms (“BPT”) deemed Petitioner unsuitable for parole. Petitioner challenged this parole denial in a state habeas petition. The Superior Court of San Joaquin County denied the writ, concluding that “some” evidence supported the BPT’s decision. The Superior Court also found that Petitioner’s parole was given due consideration.<sup>1</sup> The California Court of Appeal summarily denied the state habeas petition Petitioner filed in that court. The California Supreme Court summarily denied Petitioner’s “petition for review” of the appellate court’s decision.<sup>2</sup>

Petitioner's Section 2254 application alleges that the BPT's June 1, 2004, parole denial violates the Due Process Clause of the Fourteenth Amendment.<sup>3</sup>

II

An application for a writ of habeas corpus on behalf of a person in custody pursuant to a state court judgment “shall not be granted with respect to any claim that was adjudicated on the merits” in state court unless the adjudication of the claim:

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United

<sup>1</sup> We look to the Superior Court’s decision as the last reasoned state court opinion addressing Petitioner’s arguments. *See Franklin v. Johnson*, 290 F.3d 1223, 1233 n.3 (9th Cir. 2002) (explaining that when a subsequent appeal is denied without comment, a federal court must look to the last state court decision that actually addresses a claim).

<sup>2</sup> “[T]he sole and proper remedy after denial of a petition for writ of habeas corpus by a superior court is to file a new petition with the Court of Appeal, which has original jurisdiction in habeas corpus matters.” *In re Reed*, 33 Cal. 3d 914, 918 n.2 (1983), *overruled on other grounds as stated in In re Alva*, 33 Cal. 4th 254, 264 (2004). “Further review may be sought in [the California Supreme Court] either by a new petition for habeas corpus or, preferably, by a petition for hearing.” *Id.* Petitioner appears to have incorrectly labeled the document he filed with the California Supreme Court; the Supreme Court, however, did not correct this error, but rather summarily denied Petitioner’s attempt to appeal the California Court of Appeal’s decision. This mistake does not affect our adjudication of Petitioner’s application.

<sup>3</sup> Petitioner alleges ten separate grounds for relief. See Petr's Mem. of P. & A. at 1-2. However, each pertain to the manner in which the BPT denied his parole. Therefore, we construe each ground for relief as an argument that he did not receive due process.

1 States; or

2 (2) resulted in a decision that was based on an unreasonable  
3 determination of the facts in light of the evidence  
presented in the State court proceeding.

4 28 U.S.C. § 2254(d).

5 In his response to our request for *Irons v. Carey* briefing, Petitioner asserts that pursuant  
6 to *Irons* “there is nothing precluding the Court from granting the petition.” He reads *Irons* to (a)  
7 establish his liberty interest in parole, (b) require that some evidence support the BPT’s denial,  
8 and (c) force the court to grant his petition because the BPT denied parole on the basis of his  
9 commitment offense alone.

10 A

11 On January 8, 2008, the Court of Appeals for the Ninth Circuit decided *Hayward v.*  
12 *Marshall*, 512 F.3d 536 (9th Cir. 2008), a case in which the Governor of California twice  
13 reversed the BPT’s determination that an inmate was suitable for parole. “Under California law,  
14 the Governor, in considering whether to reverse a grant of parole by the Board, must consider the  
15 same factors the [BPT] is required to consider.” *Hayward*, 512 F.3d at 542. The Governor’s  
16 decision to reverse a parole grant is assessed “under the same procedural due process principles  
17 [courts] use to review challenges to the Board’s denial of parole.” *Id.* Therefore, *Hayward*’s due  
18 process analysis guides our analysis of Petitioner’s parole denial.<sup>4</sup>

19 The petitioner in *Hayward*, like the Petitioner in this case, challenged the evidence used  
20 to justify his parole denial. As in *Hayward*, we construe that allegation as a procedural due  
21 process claim. *See Hayward*, 512 F.3d at 542. “A procedural due process claim has two  
22 distinct elements: (1) a deprivation of a constitutionally protected liberty or property interest, and  
23 (2) a denial of adequate procedural protections.” *See McQuillion v. Duncan*, 306 F.3d 895, 900  
24 (9th Cir. 2002) (quoting *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971,

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26 <sup>4</sup> *Hayward* relies heavily on *Irons v. Carey*, which addressed the due process concerns  
implicated by a parole board’s decision to deny parole. *See Hayward*, 512 F.3d at 542-47.

<sup>1</sup> || 982 (9th Cir. 1998)).

Under the compulsion of binding Ninth Circuit precedent, we conclude that (1) “California prisoners have a liberty interest in parole,” and (2) “a parole board’s decision deprives a prisoner of due process with respect to this interest if the board’s decision is not supported by some evidence in the record, or is otherwise arbitrary.” *Hayward*, 512 F.3d at 542 (internal quotation marks and citations omitted).

B

8       Next, we turn to the question of whether the procedural protections afforded Petitioner  
9       were adequate. “When we assess whether a state parole board’s suitability determination was  
10      supported by ‘some evidence’ in a habeas case, our analysis is framed by the statutes and  
11      regulations governing parole suitability determinations in the relevant state.”” *Hayward*, 512  
12     F.3d at 542 (quoting *Irons*, 505 F.3d at 851). We must look to California law “to determine the  
13      findings that are necessary to deem a prisoner unsuitable for parole.”” *Id.* (quoting *Irons*, 505  
14     F.3d at 851). Next, we “must review the record in order to determine whether the state court  
15      decision holding that these findings were supported by ‘some evidence’ . . . constituted an  
16      unreasonable application of the ‘some evidence’ principle.”” *Id.* (quoting *Irons*, 505 F.3d at  
17     851).

Under that rubric, the “findings that are necessary to deem a prisoner unsuitable for parole . . . are not that a particular factor or factors indicating unsuitability exist, but ***that a prisoner's release will unreasonably endanger public safety.***” *Id.* at 543 (internal quotation marks and citations omitted) (emphasis added). In fact, “[s]ome evidence of the existence of a particular factor does not necessarily equate to some evidence the parolee's release unreasonably endangers public safety.” *Id.* (citation omitted).<sup>5</sup>

<sup>5</sup> The factors *Hayward* refers to are the factors the BPT uses to determine “whether a prisoner is too dangerous to be suitable for parole.” 512 F.3d at 543 (citing California Code of Regulations, title 15, § 2402). *Id.* Factors tending to show unsuitability for parole are:

2       The BPT's decision to deny Petitioner's parole was based on several factors. First, the  
3 BPT found that the offense "was carried out in a very callous and preplanned manner." BPT  
4 Decision at 66. Next, the BPT concluded that the offense was carried out "in a manner that  
5 demonstrated a total disregard for human suffering." *Id.* Also, the BPT deemed the motive  
6 "very trivial in relation to the offense." *Id.* The BPT summarized Petitioner's pre-commitment  
7 behavior, finding that he had "a record of assaultive behavior . . . an escalating pattern of  
8 criminal conduct . . . a history of unstable and tumultuous relationships" and that "he failed to  
9 profit from society's previous attempts to correct his criminality." *Id.* at 67.

10      In *Hayward*, the Ninth Circuit held that "[t]he Governor violated Hayward's due process  
11 rights by relying on the unchanging factor of motive for the commitment offense in reversing  
12 parole." 512 F.3d at 547. The Court emphasized that "the unchanging factor of the gravity of  
13 Hayward's commitment offense had no predictive value regarding his suitability for parole." *Id.*  
14 at 546. Here, the BPT's reliance on unchanging factors is similarly insufficient to justify parole  
15 denial. *See id.* at 545 (rejecting the Governor's reliance on unchanging factors as "some  
16 evidence" that a prisoner is unsuitable for parole).

17      The BPT also relied on the District Attorney's opposition to Petitioner's parole. *See* BPT  
18 Decision at 68. The District Attorney's opinion on its own is not some evidence that justifies a  
19 parole denial. *See Hayward*, 512 F.3d at 545 n.9 ("the district attorney's opinion, without more,  
20 cannot be considered 'some evidence' . . . that supports the Governor's reversal of parole").

21      The BPT further noted that Petitioner's counselors' findings regarding the likelihood that

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- 22                     (1) the prisoner committed the offense in an especially heinous, atrocious,  
23                     or cruel manner;  
24                     (2) the prisoner has a previous record of violence;  
25                     (3) the prisoner has an unstable social history;  
26                     (4) the prisoner has committed sadistic sex offenses;  
26                     (5) the prisoner has a history of mental or psychological problems; and  
26                     (6) the prisoner has engaged in serious misconduct while in prison.  
26      *Id.* (citing § 2402(c)).

1 Petitioner would engage in violent activity upon parole were inconsistent, and did not  
2 demonstrate that Petitioner had remained at a low risk level for a significant period of time. For  
3 example, the BPT noted that in 1994, Petitioner was considered to pose a “very high to  
4 moderate” degree of risk. *See* BPT Decision at 68. In 1997 and 1999, that rating was down to  
5 “low.” *Id.* at 68, 69. In 1998, the rating was “moderate.” *Id.* at 69. In 2001, Petitioner’s risk  
6 was described as “unpredictable.” Therefore, the BPT concluded that “the prisoner’s gains are  
7 recent and he must demonstrate an ability to maintain his gains over an extended period of time.”  
8 *Id.*

9 However, this description of Petitioner’s risk for engaging in violent behavior if paroled  
10 is not supported by some evidence in the record. Petitioner has attached psychological  
11 evaluations prepared by mental health professionals, and were submitted to the BPT. The  
12 evaluations were completed in 1994, 1997, 1999, and 2001.

13 The 1994 evaluation notes that “[d]uring the observation in the institution, inmate has  
14 psychiatrically improved greatly.” Petition Exhibit K-4. “Violence potential outside a  
15 controlled setting in the past is considered to have been serious, due to drug use and at present is  
16 estimated to be below average.” *Id.*

17 The 1997 evaluation states that “[s]ince incarceration[,] records indicate that Mr.  
18 Valdivia has demonstrated, consistently, a strong pattern of continuous growth and improvement  
19 in virtually all areas.” Petition Exhibit K-3. “Violence potential is much below average.” *Id.*

20 The 1999 evaluation indicates that in 1996, Petitioner’s “[v]iolence potential if released  
21 to the community was seen as far below average.” Petition Exhibit K-1. In 1998, he was seen  
22 by a psychiatrist who concluded that his violence potential was “well below average.” *Id.* As of  
23 1999, “there are several factors that would indicate a low risk for re-offense.” *Id.*

24 The 2001 evaluation indicates that “in the period since the last review, there has been no  
25 change in Mr. Valdivia’s mental health.” Petition Exhibit K. The evaluation, prepared by a  
26 psychologist, concludes:

1           Overall, it is my professional opinion that Mr. Valdivia presents  
2           little danger of repeated violence in the community if paroled. He  
3           has a practical, viable and solid plan for parole. He has prepared  
4           himself spiritually and psychologically to be successful in the  
5           community. If parole is granted, I believe Mr. Valdivia should do  
6           very well. There are no further program needs at this time.

7           These reports demonstrate that the evidence before the BPT consistently demonstrated  
8           that Petitioner has posed a low risk of violence to the community in which he would be paroled.  
9           Some evidence does not support the BPT's contrary findings.

10          We are left with the BPT's conclusions that "as late as 2001" a rule violation report was  
11         issued against Petitioner. BPT Decision at 68. The BPT's decision indicates that this report was  
12         at least partially dismissed. *Id.* at 71-72. There is no explanation as to what the violation  
13         consisted of, and it is not, on its own, some evidence that Petitioner's release will unreasonably  
14         endanger public safety.

15          Petitioner has already served the minimum number of years required for his sentence, and  
16         there is substantial evidence that Petitioner is rehabilitated. For example, he has completed his  
17         GED and taken numerous general education college courses. He has been certified in countless  
18         vocational education subjects. He has participated in Alcoholics Anonymous. He started an  
19         Apostolic Faith Church Fellowship in prison, conducted Bible study in the prison yard, and has  
20         overseen a weekly prayer meeting. At the time of his parole hearing, he had a job waiting for  
21         him outside prison. Based on the letters in the record before us, Petitioner has convinced the  
22         people who know him that he is a changed man.

23          In assessing whether some evidence indicates a parolee's release "unreasonably  
24         endangers public safety," we view the evidence "fairly and in its context." *Hayward*, 512 F.3d at  
25         544. We cannot say that some evidence in the record supports a determination that Petitioner  
26         would unreasonably endanger public safety. As a result, the BPT's denial of Petitioner's parole  
          violated his due process rights. *See id.* at 547 (holding that because "the Governor's reversal of  
          parole . . . was not supported by any evidence that Hayward's release would threaten public

1 safety . . . the Governor's reversal of his parole thus violated his due process rights").

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3 For similar reasons, we conclude that the Superior Court unreasonably applied the some  
4 evidence standard. The Superior Court unreasonably relied on two static factors—the manner in  
5 which the crime was committed, and the pattern of criminal conduct that led to the commitment  
6 offense—to conclude that some evidence justified parole denial. The Superior Court also  
7 concluded that the BPT was concerned with the likelihood that Petitioner would return to violent  
8 behavior if paroled. Yet, as explained above, the BPT's account of this factor is not supported  
9 by some evidence.

10 The Superior Court further noted that the record before the BPT included several rule  
11 violation reports. It concedes that a 2001 report, presumably the same one cited by the BPT, was  
12 “either fully dismissed or partially dismissed upon appeal.” The Superior Court mentions three  
13 other violation reports as “some evidence” that the parole denial was justified: a report issued in  
14 July 1994 for “participating in a work strike;” another issued in September 1998 for “failure to  
15 obey orders;” and a third issued in May 2000 for “disobeying a medical lay-in order.”  
16 Petitioner’s 1999 mental health evaluation, completed in February of 1999, mentions a “recently  
17 obtained” rule violation report, but notes that it is “seen as minor and appears to be inconsistent  
18 in nature and should not be considered a negative factor in the inmate’s adjustment.” Petition  
19 Exhibit K-1. If the September 1998 rule violation cited by the Superior Court refers to the same  
20 violation the evaluation mentions, it is not some evidence that Petitioner’s release will  
21 unreasonably endanger public safety.

22 Even if the September 1998 rule violation Petitioner committed is different from the one  
23 his mental health evaluation discounts, the Superior Court still unreasonably applied the some  
24 evidence standard. Its description of the three rules violations allegedly relied on by the BPT do  
25 not support the conclusion that Petitioner’s release will unreasonably endanger public safety. At  
26 most, they lend some corroboration to a conclusion that one of the factors the BPT may consider,

1 that “the prisoner has engaged in serious misconduct while in prison,” indicates parole  
2 unsuitability. *See* Cal. Code Regs. title 15, § 2402(c)(6). Yet some evidence of the existence of  
3 a particular California Code of Regulations factor applied by the BPT to decide if a prisoner is  
4 suitable for parole “does not necessarily equate to some evidence the parolee's release  
5 unreasonably endangers public safety.” *Hayward*, 512 F.3d at 543 (citation omitted). On its  
6 own, and viewed in the context of the overwhelming evidence that Petitioner is rehabilitated, it  
7 does not establish that Petitioner’s release unreasonably endangers public safety. As a result, the  
8 Superior Court’s conclusion that Petitioner was unsuitable for parole is an unreasonable  
9 application of the some evidence standard.

10 IT IS HEREBY ORDERED that Petitioner’s application for habeas corpus relief (doc. 1)  
11 is GRANTED. Within thirty days of the date of this order, the California Board of Parole  
12 Hearings (formerly the Board of Prison Terms) must calculate a term for Petitioner in  
13 accordance with the requirements of California Penal Code § 3041(a). Within forty days of this  
14 order, respondent must file a notice with the court identifying the date set for Petitioner’s release.

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16 DATED: March 14, 2008

17 /s/ Arthur Alarcón  
18 UNITED STATES CIRCUIT JUDGE  
Sitting by Designation

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